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Supreme Court, U.S.
FILED
AUG - 9 2004
OFFICE OF THE CLERK

No. 03-1714

In The
Supreme Court of the United States

MICHAEL MINNIS & ASSOCIATES, P.C.,

Petitioner,

v.

KAW NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma, Division No. III

REPLY TO BRIEF IN OPPOSITION

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Michael Minnis & Associates, P.C. ("MM&A") have petitioned for certiorari to review an opinion by the Oklahoma Court of Civil Appeals Division III. A review is sought because the Court of Appeals' opinion is contrary to federal tribal sovereign immunity jurisprudence and was entered in gross violation of MM&A's rights to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

REPLY TO INTRODUCTION AND COUNTERSTATEMENT OF THE CASE

The Respondent (hereafter "Munroe"[1]) uses the first thirteen pages of his Brief in Opposition to recite a non-chronological[2] and irrelevant series of events. For the most part these events occurred after the filing of the MM&A petition. Because the case below proceeded to judgment based solely on the allegations in the petition, the only relevant facts are those alleged in the petition. The allegations in the petition are simple and straight forward.

1. MM&A had a written contract with the Kaw Nation (App. 27-28, ¶¶ 7-8).

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[1] MM&A sued the Kaw Nation. It did not sue Guy Munroe. However, the Kaw Nation has never entered an appearance in this litigation. Guy Munroe as Kaw Nation Chairman has asserted defenses to the suit. Munroe's lack of standing is one of the issues raised by MM&A. *See* Pet. at 17-18. The attorney filing the respondent's brief is Munroe's attorney.

[2] By omitting the dates, the events all appear to run together. The impact of events cannot be judged absent a chronology. For example, Munroe mentions Lujan's removal actions. Resp. Br. at 8. Lujan's purported removal of two Executive Council members (McCauley and Pepper) was not "ordered" until March 12, 2003. These alleged removals occurred after the members had voted to adopt the resolutions attached to the Petition. In any event, the BIA in an April 8th letter confirmed that the "Lujan removals" were invalid and that "the Kaw Executive Council is still composed", *inter alia*, of McCauley, Martha Spotted Bear, Clark Pepper, and Jesse Mehojah. App. 34-35.

2. Consistent with its contract, MM&A performed professional legal services for the Kaw Nation[3] and was monthly reimbursed for its services from February 2002 through August 2002. *Id.* at 28 (¶ 10).

3. When elected in September, Munroe blocked payment of MM&A invoices despite the directions of the Executive Council. *Id.* at 28 (¶¶ 10-11).

4. Thus, on December 12, 2002, the Executive Council adopted a resolution waiving sovereign immunity and authorizing suit in the Oklahoma County District Court to recover under the written contract. *Id.* at 27 (¶ 4); at 30-31.

5. MM&A brought suit to recover for services performed in September, October, November, and December of 2002 under the contract. *Id.* at 26, 28 (¶ 12).

6. The Kaw Nation Executive Council adopted a resolution acknowledging that the services were performed and that the sums were due and owing and authorizing confession of judgment. *Id.* at 38-41.

7. The vice chairman of the Kaw Nation, consistent with the resolution, appeared in open court and confessed judgment. *Id.* at 36-37.

No answer or other pleading was filed by the Kaw Nation. Guy Munroe filed a motion to dismiss. MM&A filed a motion for judgment. The district court denied the MM&A motion for judgment and granted Munroe's motion to dismiss based on MM&A's alleged failure to exhaust tribal remedies.

On appeal, the Oklahoma Court of Civil Appeals held that MM&A was not required to exhaust tribal remedies,

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[3] The Respondent's Brief is filled with false claims that MM&A represents "certain members of the Executive Council." *Id.* at 3; *see also id.* at 6 ("Four members of the Executive Council (EC4), who were and continue to be represented by Minnis."), 12 ("Minnis and the EC4"), 15 ("the EC4 members who are also individual clients of Minnis"). MM&A was employed by the Kaw Nation. MM&A's client is the Kaw Nation who acts through its Executive Council. The Executive Council quorum of four acts by majority vote. MM&A no more represents the four individuals than the United States Attorney represents the individual Congressmen who vote for laws defended by the United States Attorney.

but affirmed the dismissal order by converting the motion into summary judgment and finding suit barred by sovereign immunity.

Munroe suggests two possible sources of his authority to participate in litigation using his name but raising defenses on behalf of the Kaw Nation, *e.g.*, that Guy Munroe and the Kaw Nation are synonymous. First, he implies that as chairman he can speak and act for the tribe. Resp. Br. at 3 (the chairman "is a natural representative of the Nation and the Nation's interests"). Second, he claims to have specific authorization from the General Council. *Id.* at 16, 30. As the Secretary of Interior, by and through the Bureau of Indian Affairs ("BIA") officials and attorneys, has made clear, neither the chairman nor the General Council is constitutionally authorized to speak and act on behalf of the tribe. *See*, *e.g.*, Pet. at 10, n.8. This determination is manifest in the provisions of the Kaw Nation Constitution.

CHAIRMAN

> It shall be the duty of the Chairman to preside at all meetings of the General Council and Executive Council. The Chairman shall have general supervision of the affairs of the General Council and Executive Council and shall perform all duties pertaining to the office of chairman, including the authority to cause laws of the Kaw Nation to be faithfully executed and obeyed, and to carry out obligations entrusted to the office of Chairman.

KAW NATION CONST. art. III, § 2.

EXECUTIVE COUNCIL

> *Powers.* (a) The Executive Council shall serve as the legislative body of the Kaw Nation and **shall have the authority to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future**, including, but not limited to, the following:
>
> 1. **To represent the Kaw Nation** and act in all matters that concern the health, peace, safety

and general welfare of the Nation and all persons within its territory, and to make decisions not inconsistent with or contrary to this constitution.

2. **To negotiate and make contracts** with Federal, tribal, state, and local governments, and with any individual, firm or company.

3. **To employ legal counsel**, the choice of counsel and fixing of fees to be subject of the approval of the Secretary of the Interior, or his authorized representative, so long as such approval is required by Federal law.[4]

4. To veto the sale, disposition, lease, or encumbrance of tribal lands, or interest in tribal lands, tribal funds, or other tribal assets which may be authorized by any agency or employee of the federal government.

5. To regulate and provide for permits, leases, and assignments of land for business, home site, and other purposes, and generally to provide for proper use a development of all tribal lands, natural resources, and other tribal property.

6. To regulate its own procedures, to appoint subordinate committees, commissions, boards, tribal officials, and employees not otherwise provided for in this constitution, to describe their salaries, tenure, and duties. Appointees may or may not be tribal members.

7. The authority to establish and describe rules for governing tribal courts and tribal law enforcement agencies and to provide for the maintenance of law and order on Kaw tribal lands.

8. To protect and preserve the wildlife and natural resources of the tribe; to regulate hunting, fishing, and trapping on tribal lands.

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[4] Because the Kaw Nation is participating in Self-Governance, Secretarial approval of attorney contracts is not required by law. 25 U.S.C. § 458cc(h)(2).

> 9. To levy and collect taxes; to regulate the conduct of business within the territory of the Kaw Nation; to charter public or private business, financial, and similar entities; and otherwise provide for the development of the economy within the territory of the Kaw Nation.
>
> The foregoing enumeration of power shall not be construed to limit the powers of the Kaw Nation and in no way shall be deemed an abdication or forfeiture of the Nation's inherent attributes of sovereignty and such powers may be exercised through the enactment of ordinances by the Executive Council.

Id. at art. II, § 4(a) (boldface added).

GENERAL COUNCIL

The only limitations on the Executive Council powers and, hence, the only nonelective[5] powers of the General Council are explained in Article 2.

> (b) The following enumerated actions of the Executive Council shall be of no effect until the General Council has approved them.
>
> 1. The sale, mortgage (except purchase money mortgages on the land being purchased), or other alienation of tribally owned lands. Leases entered into pursuant to Federal statute, revocable permits, and assignments under tribal law where legal or trust title of the Kaw Nation remains unaffected, are not alienations for purposes of this subsection.
>
> 2. The establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall or removal of tribal officers.
>
> 3. The exercise of the tribal power of eminent domain.

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[5] The General Council elects members of the Executive Council. KAW NATION CONST. art. II, § 3.

> 4. The appointment of judicial officers, except for judicial officers of an intertribal court system authorized by Article V, Section 7(b) of this Constitution.
>
> 5. Pay increases of constitutional tribal officers if such raises are to be paid from tribal funds.
>
> Except as hereafter provided, Executive Council actions submitted under this section must be approved by a majority vote of the General Council at a properly called meeting before they have any force or effect. If the General Council fails to act on actions under this section in a properly called meeting for any reason, its approval shall be deemed to have been given if and only if a statement or notice that such action will be considered was included in the public notice of the meeting.

Id. at art. II, § 4(b).

Any rational review of the Kaw Nation Constitution clearly shows that the Executive Council speaks and acts for the tribe, that the General Council (just like the general electorate in the United States) has no power to hire attorneys, to claim to represent the Kaw Nation, or to authorize the chairman to do so. It is axiomatic that only one person or entity can "speak or act" for a government.

Munroe also suggests that the power of the Executive Council to act was precluded by "injunctions" entered by Phil Lujan who Munroe claims is a Kaw Nation District Judge. Resp. Br. at 7. The problem with this suggestion, as pointed out in the Petition and as the Secretary has noted several times,[6] is that these injunctions were issued when Lujan had not been confirmed as a district judge by the General Council and hence his pronouncements "are of no effect" even if he had the power to issue them which he clearly did not. One of the votes the Executive Council members were allegedly "enjoined" by Lujan from making was a vote on "any matter concerning the appointment or approval of . . . the

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[6] *See* Pet. at 11-12.

Judge of this Court." Pet. at 12. It is as if a nominee for the United States District Judge began acting as a judge before his nomination was confirmed and entered an order enjoining the President from withdrawing his nomination before it had been voted on by the Senate.

REPLY TO REASONS FOR DENIAL OF THE WRIT

Munroe's first argument is that MM&A's petition is premature because MM&A can file their suit in "the last agreed and undisputed forum," to-wit, the Kaw Nation Tribal Court. Resp. Br. at 19. This would be true if the district court dismissal without prejudice for failure to exhaust tribal remedies had merely been affirmed. However, the Court of Appeals held that MM&A did not have to exhaust tribal remedies, but instead converted the motion to dismiss *sua sponte* into a motion for summary judgment and determined that MM&A's action was barred by tribal sovereign immunity. Even if the Kaw Nation had a valid tribal court, the Court of Appeals decision that MM&A's suit is barred by sovereign immunity has precluded further litigation in any forum. When MM&A filed this suit, the Kaw Nation had no validly selected and confirmed district judge or Kaw Nation Supreme Court justices. Even though such a court may have been authorized, it was not available. Second, the person claiming to be a Kaw Nation district judge was clearly corrupt issuing *ex parte* orders at the request of Munroe that "instanter" enjoined a majority of the governing body from voting.

In response to MM&A's arguments that determinations by the Secretary are controlling, Munroe claims

these Secretarial decisions[7] were "overturned" (Resp. Br. at 12) by an administrative law judge for the Interior Board of Contract Appeals. The Administrative Law Judge only has jurisdiction over claims filed by a contracting party. 41 U.S.C. § 606; 43 C.F.R. § 4.101.[8] He clearly has no jurisdiction over internal tribal matters and no power to overturn Secretarial determinations about internal tribal matters. *United States v. Pawnee Business Council of Pawnee Indian Tribe of Okla.*, 382 F. Supp. 54, 58-59 (N.D. Okla. 1974). The Secretary vigorously challenged Munroe's authority to use the board of contract appeals to overturn a majority decision by a tribal governing body and to overturn Secretarial determinations of internal tribal disputes. Secretarial determinations are appealable but not to the board of contract appeals. Here Munroe did appeal the Secretarial determinations to the Interior Board of Indian

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[7] Munroe quotes from his own brief a claim that the "OSG and BIA apparently accepted at face value ["questionable assertions by the EC4 group"] without notice or investigation." Resp. Br. at 13. This is not an accurate representation of the record. A majority of the Executive Council voted to retrocede Self-Governance funding for the court system in November and December of 2002 and reported December 2 to the BIA that it could find no record that any of those claiming to be Kaw Nation judges or justices had been selected and confirmed as required by the Kaw Nation Constitution. On December 12th, the BIA wrote Munroe asking for documentation of the judicial appointments. In a December 20th letter, Munroe refused to provide the documentation. In a March 17, 2003, letter, the BIA announced it was reassuming jurisdiction over Kaw Nation Indian country effective February 28, 2003.

[8] Munroe states that the "BIA issued letter rulings indicating it would assume judicial authority of the Tribe" and then claims that he "appealed these decisions * * * to the Interior Board of Contract Appeals." Resp. Br. at 12. This is not accurate. Munroe did appeal "these [BIA] decisions" but not to the board of contract appeals. He appealed them to the Interior Board of Indian Appeals which dismissed the appeal. What Munroe appealed to the board of contract appeals was the Office of Self Governance decision to cut funding under the Annual Funding Agreement. Because the BIA "decisions" did not involve a contract, an appeal to the board of contract appeals would have been clearly improper. That the board of contract appeals "overturned the decisions of the OSG and BIA" (*id.*) is indicative of how far the board exceeded its jurisdiction.

Appeals[9] which dismissed his claim. The Secretary and the Kaw Nation (who the Administrative Law Judge refused to hear) have filed appeals. *Kaw Nation v. Secretary of Interior*, Nos. 04-1029 and 1077 (Fed. Cir.). In any event, the Administrative Law Judge's decision came long after MM&A filed its suit.

Munroe also argues that MM&A misstated the holding in *Citizen Band Potawatomi v. C&L Enterprises*, 532 U.S. 411 (2001). Resp. Br. at 23. Munroe apparently misunderstood MM&A's argument. In *Citizen Band*, this Court found language in an arbitration clause to be a clear and explicit waiver of sovereign immunity. MM&A's point is that this Court also implicitly acknowledged[10] that a majority of a tribal governing body could make such a waiver because C&L alleged in its petition that the arbitration clause was in a contract signed by 3 of the 5-member Business Committee.[11] The *Citizen Band* litigation involved a petition challenged by a tribe asserting sovereign immunity. C&L moved for judgment and the tribe moved for dismissal based on sovereign immunity. The Trial Court denied the tribe's motion and granted judgment for C&L. As MM&A argued, the facts showing waiver here are much stronger than those found to be valid in *Citizen Band*.

Finally, Munroe claims that MM&A did not properly raise the denial of due process. Munroe argues that MM&A "made no request for an evidentiary hearing after being given notice of the Court rule from the brief." Resp. Br. at 28. Why would MM&A request an evidentiary hearing on a

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[9] *See generally* 25 C.F.R. Part 2; *id.* § 2.3 (a) ("this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.").

[10] "The question is whether the tribe has waived immunity." *Id.* at 418.

[11] *See, e.g., C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe*, 2002 OK 99, ¶ 14, 72 P.3d 1 ("the Tribe does not dispute . . . that Tribal officials executed it. Hence, the contractor's proof of the contract made a prima facie case. . . .").

motion to dismiss when such a motion under state law presumes that "all of the challenged pleading's allegations [are true] together with all reasonable inferences which may be drawn from them"? *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844.

MM&A's claim of denial of due process is based on the refusal of the Oklahoma courts (District Court and Court of Civil Appeals) to litigate Munroe's standing and on the Court of Civil Appeals' *sua sponte* conversion of an order granting a motion to dismiss into summary judgment. MM&A consistently challenged Munroe's standing in every pleading it filed. MM&A challenged the denial of due process by the Court of Civil Appeals in its Petition for Certiorari to the Oklahoma Supreme Court asserting that converting an order granting a motion to dismiss into summary judgment violated MM&A's State statutory procedural laws and MM&A's due process rights.[12]

CONCLUSION

The opinion below is contrary to this Court's tribal sovereign immunity jurisprudence and to MM&A's rights guaranteed under the Fourteenth Amendment of the Constitution and should be reversed.

Respectfully submitted,

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[12] *See, e.g., Michael Minnis & Associates, P.C. v. Kaw Nation*, No. 99,565 (Okla. Sup. Ct. 2004) (reply to answer to petition for certiorari of Michael Minnis & Associates, P.C. at 3).